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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1861

LOCAL 281, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ERVIN F. LAMBERT, RUDY COLTON and DUANE KANE,
Petitioners,

vs.

ANDREW BACKO, MIKE KARAMAN, CASIMIR MACKO, JAMES BARNO and ERCELL CUMMINGS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 29, 1970.

Opinions Below

The Opinion of the Court of Appeals is reported in 438 F. 2d 176 and in 76 LRRM 2184. The Opinion of the District Court for the Northern District of New York is reported in 308 F. Supp. 172 and in 73 LRRM 2052.*

Jurisdiction

The judgment of the Court of Appeals was entered on December 29, 1970. A timely petition for rehearing *en banc* was denied on July 7, 1971, and this petition for certiorari was filed within 30 days of that date as to the criminal phase of this case and within 90 days of that date as to the civil phase of this case. This Court's jurisdiction is invoked under 28 U. S. C. Section 1254 (1).

Questions Presented

1. Can an individual be held in either criminal or civil contempt of court for the violation of an alleged court order when, though he has knowledge of an order, there has been no service of a summons and complaint with this order and the order itself does not meet the statutory requirements imposed by 29 U. S. C., Section 1691, by Rule 65 and Rule 44 of the Federal Rules of Civil Procedure and Rule 27 of the Federal Rules of Criminal Procedure?

2. In proceedings for criminal and civil contempt are defendants deprived of their right to a trial by jury and their right to confront the witnesses against them where the trial court relies for its decision on evidence which was not introduced on the trial to substantiate a finding of *in personam* jurisdiction over the defendants?

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* The Opinions of the District Court and the Court of Appeals are reprinted in Appendix A hereto (p. 1a) and Appendix B hereto (p. 12a).

3. Are defendants denied their right to a fair trial when the trial court first instructs the jury that the defendants' crime charged was that they deliberately and wilfully proceeded with a scheduled union election and then later charges the jury that the crime charged was that defendants allowed the election to commence without taking any action to stop it?

4. Can an individual be held in contempt of a court order which, contrary to Rule 65 of the Federal Rules of Civil Procedure, fails to expressly command the performance of any specific act?

5. Can individuals and a labor organization be held in either criminal or civil contempt of court when there has been no service of a summons and complaint pursuant to Rules 3 and 4 of the Federal Rules of Civil Procedure on the theory that the individuals are liable because they are agents of the union and that the union is liable because of the agency?

6. Does a District Court have jurisdiction under 29 U. S. C. Section 481 (c) to enjoin a scheduled union election.

7. When the trial court instructed the jury that plaintiffs were entitled to recover as damages attorneys fees for both the criminal and civil contempt proceedings was it proper for the Court of Appeals to rule that the jury ignored the charge? Isn't such a holding directly contrary to *Carpenters v. U. S.*, 330 U. S. 395.

Statutes Involved

The statutory provisions involved are 29 U. S. C. Section 481 (c); 29 U. S. C. Section 525; 29 U. S. C. Section 528; Federal Rules of Civil Procedure, 3, 4, 5E, 44 and 65; Federal Rules of Criminal Procedure 2, 7, 10, 27 and 42 (1e); and the Fifth and Sixth Amendment to the Constitution of the United States.

Statement of the Case

Petitioners seek review of a judgment entered against them after a jury rendered its verdict in a civil contempt proceeding on September 26, 1969[1] and of convictions of criminal contempt after a jury trial on September 25, 1969.[2]

The civil and criminal contempt proceedings were brought on by a Second Amended Order to Show Cause and For Contempt Judgment dated October 1, 1968.[3] The alleged contempt of court was the refusal to comply with and carry out the provisions of an Order to Show Cause and Temporary Restraining Order which purported to en-

[1] Petitioners Local 281, Lambert, Colton and Kane, had judgment entered against the mfollowing the civil contempt trial. Thomas P. McMahon, Esq. maintained throughout the proceeding that he was retained solely by Local 281.

[2] Petitioners Lambert and Colton were found guiity of criminal contempt. Thomas P. McMahon, Esq. maintained throughout this phase of the trial that he appeared for Local 281 and Lambert and that at no time did he realize that petitioner Colton was a defendant or that he represented him. Mr. McMahon was not retained nor did he represent Colton and Mr. Colton so insists he was denied right to counsel.

[3] The Second Amended Order to Show Cause and For Contempt Judgment is reproduced as Appendix C hereto (p. 25a).

join a union election scheduled for June 6, 1968, at 1:00 P. M. The Temporary Restraining Order[4] was signed on June 6, 1968, at 10:33 A. M.

The Second Amended Order to Show Cause and For Contempt Judgment (hereinafter "Order for Contempt") requested that an order issue declaring the said election of Local 281 null and void and of no effect,[5] that an order "be granted directing the continnors to pay damages to the plaintiffs, and also to pay plaintiff's counsel fees, costs and other expenses necessarily incurred in connection herewith, and that this Honorable Court grant such other and further relief and punishment as is just and proper under the circumstances."

The Order to Show Cause and Temporary Restraining Order, as reproduced in Appendix 27a, which was allegedly involved, was received in evidence over objection. The paper received did not bear either the seal of the Court or the signature of the Clerk as is required of a valid order by 28 U. S. C. 1691 nor did it bear the certificate of the Clerk as required by Rule 44 of the Federal Rules of Civil Procedure and Rule 27 of the Federal Rules of Criminal Procedure.

Upon the return of the Order for Contempt Judgment on October 28, 1968, Lambert appeared by counsel and the

[4] The Order to Show Cause and Temporary Restraining Order is reproduced as Appendix D hereto (p. 27a).

[5] Plaintiffs had already obtained a "Judgment" filed on June 17, 1968 in Civil Action No. 68-CV-186 entitled "Andrew Backo, *et al.* Plaintiffs vs. Local 281, United Brotherhood of Carpenters and Joiners of America, *et al.*, Defendants" which declared "the purported election held on June 6, 1968 and the results thereof . . . null and void", and "the said purported election results . . . vacated" and, the election of June 6, 1968 was ordered to be and was held on June 27, 1968. The order of the Court is reprinted as Appendix E hereto (p. 30a).

Court assumed a hearing was necessary with which plaintiff's attorney agreed "to establish the fact that the orders were duly served" (R. 3-4).[6]

The following colloquy ensued (R. 5).

> Mr. McMahon: Now, your Honor if the papers here advance a matter of proceeding in criminal contempt of court, then I would say, number one, the plaintiffs don't have status, they have invoked the wrong procedure.
>
> The Court: I don't believe that this is a criminal contempt. If it were criminal contempt I think you would be entitled to a criminal trial. I am not treating this as a criminal contempt.
>
> Mr. McMahon: Well I must say, your Honor, I didn't either, but my experience teaches me to be very careful in this area to find out so that I can protect my client's rights in the manner we are proceeding in.
>
> The Court: Well, I think the record should show that the Court is treating this as a civil contempt.

A motion was then made that service of a contempt judgment must be either compulsory or compensatory the petition must fail since, in view of the judgment already entered on June 17, 1968, reprinted in Appendix 30a, there was no compulsion which could be brought upon defendants and there could be no compensation since plaintiffs had obtained all of the relief to which they were entitled (R. 5-6).

The Court then asked (R. 5-6).

> The Court: You mean he has done nothing to offend the Court.

At the conclusion of the argument on the motion the Court inquired (R. 9):

> The Court: Now the Court has indicated that . . . from the title of the action here alone, I regarded it as a civil contempt. On the other hand, supposing the plaintiff has intended to bring a criminal contempt.

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[6] "R's" herein refer to the record certified to this Court.

The District Court was reminded of its earlier determination that the matter was a civil contempt to which the Court responded that the "Court was a little presumptious" (R. 13).

The Court then asked the plaintiffs' attorney whether he had instituted a civil or criminal contempt proceeding. The response was (R. 17).

> Mr. Romas: Your Honor, my intent here was I think that the papers in asking for 'and for other punishment' that it be both civil and criminal.

The Court received a brief from plaintiff's attorney which was directed to points raised on the order for contempt judgment.

The District Court, nine months after signing the Order for Contempt Judgment appointed the plaintiffs' attorney as Attorney to prosecute the alleged criminal contempt.[7]

Once appointed, Mr. Romas did not serve anyone with any additional writ, process or notice of any kind.

During his instructions to the jury, the Court explained to the jury that "one of the sides to the dispute came into Court with a complaint before Judge Port and they asked Judge Port for relief." (R. 3)

No complaint and no summons was ever introduced during either the criminal or civil contempt trial and there was no proof that a summons and complaint ever existed. When a summons and complaint was finally produced after the trial the summons bore a stamp indicating that it had been filed on June 6, 1968. The summons, however, is dated June 7, 1968. It is respectfully urged that a summons issued on June 7, 1969, could not have been filed on June 6, 1968.

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[7] A copy of the order is reprinted in Appendix F hereto (p. 33a).

The Court then, after a brief recital of the reasons Courts issue injunctions, averred that "this particular injunction . . . forbade the holding of an election by this union. The election was scheduled to be held at 1:00 o'clock that afternoon. The injunction was issued by Judge Port in open Court sometime around 10:30 that morning. The union and its officers went ahead and held the election anyway. That is the charge (R. 4-5).

When defense counsel asked that these remarks be placed on the record and that the jury be instructed that the Court's statements were subject to proof the Court retorted:

> "The charge here is that Judge Port issued this injunction, that the defendants knew about it, and that nevertheless they deliberately and wilfully went ahead with the election anyway (R. 5)."

The Prosecution's case consisted of testimony that Judge Port made a phone call from Auburn, New York, to petitioner Colton's office in Binghamton, New York. He spoke to Colton's secretary, Mrs. Betty Wilke, and informed her of the injunction he had just signed and requested that Colton return his call. Mrs. Wilke gave this message to Lambert but Judge Port's call was not returned. Around 1:00 P. M. when the Order was served on Colton, Lambert was standing next to him. Romas told Colton that he was deputized by Judge Port to serve the order. Lambert told Colton to put the paper in his pocket and talk to a lawyer later. Later that evening, copies of the papers were served on the Defendant, Duane Kane.

4. Mr. Romas, the plaintiffs' attorney, Process Server and Special Prosecutor, was permitted to testify over objection (R. 37, 38, 39) and became the chief witness for the prosecution.

5. Mr. Romas testified: that the order he had signed by Judge Port on June 6, 1968 was Plaintiffs' Exhibit 2 (R. 41). He then testified that he and Mr. Leslie drove from Auburn, New York to Binghamton, arriving a few minutes before 1:00, that Leslie identified Mr. Colton and "then I proceeded to serve this paper which was the order signed by Judge Port, upon Mr. Colton * * *" (R. 45) (emphasis added); that he told Colton that he, Romas, "had been deputized by Judge Port to serve this order, and what was in the order, and I also pointed out to him that this order pertained to the election and it was an order from Judge Port to stop and not hold it," and that so far as he could tell these people were starting to get ready to enter, and they hadn't started yet (R. 45); that he returned to the same area in front of the union hall on the same day at approximately 7:30 P. M., and he served copies of the injunction[8] upon Duane Kane, Mr. Paterninti and Mr. Julius Amidio, the Chairman of the Election Committee, pointing out to each that this was a Federal Court injunction prohibiting the holding of the election and/or tallying the ballots and that Mr. Paterninti said he was illiterate and couldn't read, and that Mr. Lambert told Paterninti to put the paper in his pocket and give it to the lawyer the next morning (R. 48).

Whereupon Plaintiffs rested (R. 48).

Defendants then made the following motions to dismiss on the grounds that:

> There was absolutely no compliance with Rule 42 (b) of the Federal Rules of Criminal Procedure; the entire procedure was unconstitutional; the defendants had not been clearly identified (R. 49). That whatever they have been alleged to have done is not alleged to be criminal (R. 50). That there was no allegation in the

[8] As on p. 12.

Second Amended Order that these acts were wilful, contumacious, in blatant disregard of the Court (R. 50). That the alleged original injunctive order had to be served upon an officer or business agent on or before June 6 at 1:00 P. M. (R. 54). That there was no proof that the complaint had been filed and that the summons and complaint had been served on any defendant (R. 57, 58). That the Court had no jurisdiction to issue the alleged injunctive order enjoining the holding of a union election (R. 61).

(8) No summons or complaint was served; it was after 6:00 P. M.; so there was still no "defendant", the principal being Local 281.

The Court ruled that as to service, "that doesn't matter even if it wasn't served, if you know about it and you deliberately disobey it, and you are one of the class whom was addressed, you are hooked, whether it was ever served or not" (R. 54, 55).

The Court's Charge—to which exception was taken:

The Court charged the jury:

1. "Now these defendants have been charged by what we call an order to show cause with deliberate, wilful and knowing violation of Judge Port's order forbidding the union to go ahead with the election" (R. 82, 83).

2. "You must consider each of these defendants separately and determine whether the plaintiffs have established to your satisfaction beyond a reasonable doubt as to each defendant the following elements: One, that an order was signed by Judge Port on June 6, 1968, restraining the annual election of Local 281, United Brotherhood of Carpenters and Joiners of America, scheduled to be held at 1:00 P. M. on June 6, 1968; Two, that the defendant was an officer of Local 281; Three, that defendant prior to the commencement of the election had actual notice of Judge Port's order, that is he knew that Judge Port had forbidden the election, and Fourth, that despite the

fact that he knew that, the defendant deliberately, wilfully and knowingly disobeyed the order of Judge Port and allowed or participated in the election and allowed it to commence" (R. 85).

Exception was taken to so much of the charge as describes the named defendants and the exception noted.

Exception was taken to the refusal to charge that service prior to 1:00 P. M. * * * was an essential element of the offense. The Court responded that it had not received requests to charge and that in the Court's opinion service of the injunctive order is not an essential element. "The Court averred that the essential element is knowledge (R. 90)."

Exception was taken to the refusal to charge that there was no proof that special deputy Romas had complied with Judge's order with respect to the service of a summons and complaint commanding that service of the order be made along with the summons and complaint (R. 90).

The jury retired and returned two hours later with a note asking for the names of the defendants and their titles. The reporter read back the testimony of the witness Leslie (R. 10).

Exception had already been taken.

The jury returned an hour and thirty-five minutes later with an additional request for instruction as to whether a verdict was required on each defendant or only one verdict for all.

Exception was taken again on the basis—"There is only one defendant, it is the union." Exception was noted (R. 93, 94).

The Court admitted the point had merit, but it was technical mishmash (R. 94).

THE JURY'S VERDICT:

As noted the jury returned verdicts of guilty against Lambert and Colton.

Judgments were entered on the verdicts of guilty[9]. The Court of Appeals affirmed the judgments of the District Court.

Plaintiffs' attorney and the Court proceeded on the assumption that the trial of the civil contempt constituted a continuation of the criminal contempt and all that was in issue was the question of damage.

The plaintiffs' theory of damages was stated to the Court as consisting of 1) Legal fees that plaintiffs had to expend in retaining a lawyer to get the injunction 2) the time they took away from work 3) their derivative right as members of Local 281 to the expenses incurred by Local 281 4) attorney's fees for bringing the civil contempt action 5) damage to egos, ridicule and scorn, and 6) that even if there was any damage to plaintiffs by reason of the alleged contempt, they are entitled to the costs and expenses of bringing the civil and criminal contempt (R. 97, 98).

In support of this theory plaintiffs introduced the testimony of James Barno who testified as to the expense incurred in printing slingers for the second election (R. 118, 119).

Mr. Romas was again called to testify and over objection was permitted to testify as to the fair and reasonable value of his services and expenses in connection with the prosecution of the civil and criminal aspects of the contempt proceeding and submitted as evidence the pre-trial memoran-

[9] The judgments of the Court are reprinted as Appendix G hereto (p. 34a).

dum he prepared for Judge Port (Plaintiffs' Exhibit No. 8) (R. 152, 153).

Defendants moved to dismiss for a failure of proof which was denied (R. 147).

The jury found in favor of the plaintiff and judgment was entered on the verdict.[10] The Court of Appeals affirmed the judgment of the District Court.

Reasons for Granting the Writ

It is submitted that there is such a wealth of error committed below, such a serious departure from established and accepted procedure, such a clear conflict in the Circuit Courts, that this Court should grant this petition.

A) The Temporary Restraining Order

The Statute, 18 U. S. C. Section 401 requires that an essential element of the offense to be established by proof beyond a reasonable doubt that an order was signed by the District Court restraining the annual election of Local 281. *Hood v. U. S.*, CA 5, 326 F. 2d 33. In the instant case the Temporary Restraining Order was admitted into evidence, over objection, lacking certification of the Clerk of the Court as required by Rule 44 of the Federal Rules of Civil Procedure and Rule 27 of the Federal Rules of Criminal Procedure.

The Special Prosecutor, plaintiffs' attorney, specially appointed deputy for service of process and the Prosecution's chief witness, Mr. Romas, was permitted to testify in the face of the clear rule established in the Second Circuit in

[10] The judgment of the Court is reprinted as Appendix H hereto (p. 36a).

U. S. v. Alu[11] that the District Court had signed the order. But if there were such a valid order complying as a valid order must with Rule 44 of the Civil Rules, Rule 27 of the Criminal Rules and 29 U. S. C. Section 1691 the order should have been able to speak for itself obviating the highly prejudicial effect of the government prosecutor's testimony.

The document introduced further purports to dispense with the service of a summons. That being done away with the Order to Show Cause is the only process and, quite obviously, it fails that test.

Furthermore, the Order does not fulfill the requirement of Rule 65 of the Federal Rules of Civil Procedure that an injunctive order be clear and specific. This Court had occasions to enforce Rule 65 in *International Longshoremen's Association Local 1291 vs. Philadelphia Marine Trade Association*[12] and in so doing held that Rule 65 means exactly what it says.

The Second Circuit in a long line of cases from *Berry v. Midtown Service Corp.*[13] has held that:

> "Once we adopt the principle that an express order to one party carries implications of duties imposed upon the other, it would be difficult to set limits upon the doctrine. We believe it a wiser policy to punish as contempt only the disobedience of some express command."

There is simply no express command to do anything, however. The order is to refrain, not to perform. The defendants are found guilty of having "allowed or participated in the election and allowed it to commence." There

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[11] 246 F. 2d 29 at 33-34 (2d Cir., 1957).

[12] 389 U. S. 64, 74.

[13] 104 F. 2d 107, 111 (2d Cir., 1939).

is not a shred of evidence that any individual defendant participated in the election. There was no order directing them to stop it.

B) The Order for Criminal Contempt

Criminal contempt proceedings require at least those elemental notions of fair play embraced in the concept of due process of law, such as notice, service, clarity, specificity, to be tried on evidence, and to be given an opportunity to meet the evidence. *Gleason v. Restaurant Employees Union*[14]; *Vars v. Boilermakers*[15].

The requirement is that the title of the contempt citation is essential:

> "This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or public prosecution, whether it sought to benefit the complainant or vindicate the Court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit. *Gompers v. Bucks Stove*, 221 U. S. at 446."

If that principle obtains that an individual is entitled to know that it is a "charge and not a suit" then we submit that it necessarily includes the requirement that the person charged be advised that he is being proceeded against at all.

The plain and simple fact of this matter is that none of the defendants were ever served personally with the Contempt Order.

---

[14] Cite to Gleason v. Rest. Em'ees Union

[15] 320 F. 2d 576 (2d Cir., 1963).

The Contempt Order does not name any individuals as defendants.

The Contempt Order bears a civil title and civil action number, the relief it demands is for "damages to the Plaintiffs, and also to pay Plaintiffs' Counsel fees, costs and other expenses necessarily incurred in connection herewith" and for such "other and further relief and punishment as is just and proper." While the payment of Plaintiffs' counsel fees may be punishment (both cruel and unusual), under the rule of *ejusdem generis*, the punishment would be of the same type or kind. The rule of *Gompers v. Bucks Stove, supra*, would require something clearer than this to create notice that this was a criminal contempt, who the defendants were, and what the crime was.

But the reasoning goes that while defendants were never served, and Judge Port said the matter was civil, although when Judge Port asked Mr. Romas, what kind of order he, Judge Port signed, Mr. Romas thought it was both, and when nine months later Judge Port appointed Mr. Romas, as special prosecutor to prosecute the alleged "criminal contempt", *nunc pro tunc*, that, therefore, counsel for defendants knew a criminal contempt was charged, who the defendants were, and what constituted the contempt. Perhaps individuals are chargeable with the knowledge or ignorance of their attorney, but if they have not retained that attorney we fail to see how they are chargeable with anything at all.

It seems to us a fundamental rule of common law and common sense that even when a person retains an attorney to defend a negligence case, and the court later appoints the plaintiff's attorney as special prosecutor to try the

criminal negligence, that the client does not thereby forfeit his constitutional rights to service of the criminal charge and have the right to choose his attorney for such a case.

We argue that Rule 42 (b) means what it says, and has to mean it, in order to preserve its constitutionality.

Bloom v. Illinois (1968), 391 U. S. 194 is instructive here only in that reasserts that the constitutional requirements, in that case the right to trial by jury, obtain to criminal contempts, since they are criminal proceedings:

> "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes:
>
> 'These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.' "

Gompers v. U. S., 233 U. S. 604, 610 (1914).

Rule 2 of the Rules of Criminal Procedure states the rules are intended to provide for the just determination of every criminal proceeding. Rule 3 requires that there be a written statement of the essential facts constituting the offense charged, and Rule 4 requires that if it appear that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. This is but a simple restatement of the basic requirements of the Fourth Amendment to the United States Constitution. *Giordenello v. U. S.*, 357 U. S. 480 (1958). *Brinegar v. U. S.* (1949), 338 U. S. 160, 175.

We state simply that the contempt order does not contain nor is it supported by a writing that contains the essential facts constituting the crime charged, nor does it support by any rational basis the requirement of probable cause to believe that an offense has been committed or that the defendant committed the offense.

Rule 7 which requires that on indictment or information (or contempt order) contain a plain, concise and definite written statement of the essential facts constituting the offense charged and the means by which it was committed is a paraphrase of the Sixth Amendment right to be informed of the nature and cause of the accusation in order to prepare his defense. *Russell v. U. S.* (1962), 369 U. S. 749, 764, and the Fifth Amendment right to due process, and preventing double jeopardy. *ILA v. Phila. M. T. A.*

We contend that the contempt order woefully fails to meet either the constitutional requirement or the Rule.

Rule 10 requires that defendants be arraigned and Rule 11 that they be entitled to enter a plea, Rule 43 requires that the defendant be present at the arraignment and at every other stage of the proceeding, and by Rule 44 that defendant have the right of counsel. The obvious constitutional correlation is obvious, and equally obvious is that the individual defendants were not accorded, indeed, they were denied, these rights.

The contempt order doesn't begin to comply with Rule 42 (b) of the Federal Rules of Criminal Procedure. The case was obviously bent on a civil contempt, its title, its purpose were all directed to obtaining attorney's fees. The whole idea of characterizing this matter as a "criminal" contempt was born out of desperation when it became obvious to Judge Port and Mr. Romas that there was no

rational basis to sustain a civil contempt. The order of Judge Port issued on July 23, 1969, nine months after the motion of October 28, 1968, appointing Romas as Special Prosecutor, *nunc pro tunc*, as of July 22, 1968 cannot serve to evade the plain requirement of the statute, the plain requirement of the constitution, and the plain requirements of fairness and justice, that (1) the defendant be named (2) that defendant be served (3) that defendant be charged (4) that the facts constituting the alleged contempt be simply and concisely stated (5) and that they be described as criminal.

Obviously this wasn't done, because it is perfectly obvious that it was never intended to be done. Plaintiffs' counsel was interested, indeed it was his hole intent to collect a fee for having obtained the alleged order of June 6, 1968. The characterization of this matter as a "criminal contempt" was of no significance to him. The rather amusing colloquy between Plaintiffs' attorney, as Special Prosecutor, in the criminal contempt case and his thought that "this is the proper time for us to make a motion * * * to ask the *ad damnum* be increased * * * I ask that our attorney's fees be increased" (R. 27) is testimony not only to his perseverance, but plainly reveals that the contempt order not only fails to comply with Rule 42(b) of the Criminal Rules, but that the thought never crossed his mind until the argument of the motion to dismiss the civil contempt on October of 1968, and reveals further that his desperate thought "I think was both" (R. 17) was done simply to obtain a vehicle to collect a fee he conceives himself entitled to.

The trial court's post trial recourse to other documents and the clerk's certification of this record on appeal is erroneous and prejudicial for one other reason.

Again by recurrence to *Gompers v. Bucks Stove & Range Co.*, 221 U. S. at 445, we are taught that:

> "Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause."

See also *Michelson v. United States*, 266 U. S. 42 at 64.

But the trial court, and to a large extent the clerk, treated the criminal contempt as part and parcel of the original action.

We conclude by restating our argument that Title 18 U. S. C. 401 states the jurisdictional basis and the substantive elements of the crime of contempt *viz.* "authority", "disobedience", "the existence of the Court's lawful writ, process, etc." Howatt v. Kansas, 280 U. S. 180 at 189-190 and that the proceeding must, as a minimum be instituted pursuant to Rule 42(b) of the Criminal Rules, and be proved to the satisfaction of a jury. 29 U. S. C. 528.

c) Resort to post-trial investigation to make a finding of in personam jurisdiction.

As noted earlier no one was served with a summons and complaint. The only named defendant on the Order to Show Cause was the defendant Union. If the command of 29 U. S. C. 525 is to mean anything there could have been no jurisdiction over the defendant union until an agent was served with a summons and complaint. Failing jurisdiction over the Union none of the individual defendants had anyone or anything to abet and the charge against them should have been dismissed. There was no testimony, even from

Mr. Romas, that any union officer was served with a summons and complaint. The trial court originally said there was no need for such service. But in its decision, apparently convinced that the Court had no authority to begin without *in personam* jurisdiction, the Court relies on matter which was not introduced on the trial.

As further noted the trial court stated clearly that jurisdiction was unnecessary. This is clearly contrary to the rule of *Howatt v. Kansas*, 280 U. S. 180 at 189-190; *Hitchman Coal and Coke Co. v. Mitchell*, 254 U. S. 229; *Eighth Regional War Labor Board v. Humble Oil Co.*, C. A. 8, 145 F. 2d 462, 464, as the text writers state:

> "The general nature of an action or proceeding for an injunction is *in personam* and hence the Court must name *in personam* jurisdiction over the party against whom the injunction runs." 7 Moore's Fed. Prac. 2d Par. 65.03 pgs. 16-22.

The case of *Gojack v. U. S.*, 384 U. S. 702, a sequel to *Russell v. U. S.*, 369 U. S. 749 was a criminal contempt of Congress brought pursuant to statute (2 U. S. C. A. 192), as is the case at bar. In *Gojack*, the Solicitor General acknowledged that there was "no direct evidence" of jurisdiction to conduct the major investigation but argued that the Court should "infer" Committee approval of the inquiry. The Court answered:

> "But this is clearly impermissible.
>
> * * *
>
> We are here concerned with a criminal proceeding. It is clear as a matter of law that the usual standards of the criminal law must be observed, including proper allegation and proof of all essential elements of the offense.—Citation omitted."

This is a criminal proceeding, and we categorically assert that Mr. Romas' testimony is not "vague," but reflects the plain truth of the matter that the only document he served on Colton was the alleged "Order" the third decretal of which required service of the alleged "Order" together with a copy of the papers hereto attached "*and together with the Complaint* in this action be made on Defendant Local 281 etc."

That the Courts below would place any credence in Mr. Romas' hearsay statements to the Clerk and then imply that defendants had the burden of disproving what had never been introduced in evidence, and which the trial court said was totally irrelevant, see to us a long way around "the usual standards of the criminal law." It is, we insist, a direct violation of the "confrontation clause" of the Sixth Amendment, and a practice specifically rejected by this Court in *Barber v. Page*, 390 U. S. 719 at 721:

> "Many years ago this Court stated that 'the primary object of the (confrontation clause of the Sixth Amendment) * * * *was to prevent depositions or ex parte affidavits* * * * being used against the prisoner in lieu of a personal examination and cross examination of the witness * * *
>
> 'There are few subjects, perhaps, upon which this Court and other Courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this Country's constitutional goal.' "

Mr. Romas testified. He testified over objection, but testify he did, and he testified that he served the alleged "Order" which did not contain the certification of the Clerk, which did not contain the signature of the Clerk, which did not contain the seal of the Court. Mr. Romas'

ex parte statements to the Clerk are incompetent, are not evidentiary, and denied defendants their constitutional right to be confronted by the witness.

C. The *ex parte* statements are palpably false and inaccurate.

(1) The Court below states: "The testimony is unclear as to exactly what Judge Port did with the complaint." There is not a shred of testimony as to what Judge Port did with the complaint, nor is there a shred of testimony that Judge Port had any complaint with which to do anything.

(2) Continuing, the Court states "However, on the complaint as well as on the show cause order and temporary restraining order which Judge Port signed it is noted 'Filed 6/6/68; [at] 10:33 a. m. at Auburn, New York, [signed] E. Port, U. S. D. J.'"

(a) Upon reading the District Court's decision in this matter, Thomas P. McMahon wrote to the Clerk of the United States District Court for the Northern District of New York and requested, paid for and received exact copies of all the original papers filed with him as Clerk.

(1) The Court is incorrect when it states "*on the complaint* as well as on the Order * * * it is noted on the top left in ink: Filed 6/6/68 etc." There is such a notation on a *summons,* but that *summons,* signed by "W. A. Dwyer, Clerk of the Court United States District Court, Northern District of New York, bears the date '6/7/68' and that is the plain truth of the matter."

(2) "The docket entry of the Clerk states that a summons and complaint was filed on June 6, 1968. This constitutes *prima facie* evidence that

the complaint was filed by Judge Port at the time noted and there is nothing in the record to rebut that fact." We respectfully submit that it is not evidence and it is not a fact. The Court below at page .... states "The parties were in Auburn, New York (Mr. Romas was) where there was no Court Clerk * * * it is clear that Judge Port felt it best to advise plaintiffs to use the order itself to obtain jurisdiction * * *"

The Court below should not have countenanced the palpable falsehood "the docket entry of the Clerk states that a summons and complaint was filed on June 6, 1968."

The Court below should not have countenanced the falsehood stamped on the rear of the "original summons and complaint" to wit: "Filed June 6, 1968—10:33 o'clock a. m. W. A. Dwyer, Clerk Pd. $15.00 D. I."?

The Court below should not have countenanced the falsehood in the docket entry of June 18, "Return of Service of Summons and Complaint etc. on Duane Kane, Sebastian Paternintu and Julius Amido personally on June 6, 1968" when the Court acknowledges that there was no summons to serve.

(3) We respectfully submit that there is "no evidence" to support the finding of jurisdiction and we go further and assert that it is illogical and unfair to assert that the docket entry allegedly made June 6, 1968 to the effect that a summons and complaint was filed on June 6, 1968, when it is plain that there was no summons to file, and when the

summons is dated June 7, 1968 is *prima facie* evidence of the fact. If Mr. Romas, omnipresent though he be, filed the complaint on June 6, 1968, at 10:33 a. m. and paid the $15.00 filing fee on June 6, 1968, then the Court's conclusion at page 18a that there was no Court Clerk in Auburn and the Court's confidence in what "Judge Port felt it best to advise plaintiffs" is erroneous and misplaced and the novel and unprecedented Judicial dispensation of *ex necessitatu* from the plain requirements of Rule 4 of the Federal Rules that the summons and complaint be served together was unnecessary.

II. The federal labor policy of abstention from intra-union elections in favor of self regulation will be seriously eroded if the decision below is allowed to stand.

This case presents a question of critical importance in the scheme of federal labor policy which has not been decided by this Court. There is no doubt that Congress has expressed a clear preference in 29 U. S. C. Sections 481 *et seq.* for the self regulation by unions of union elections and failing that intervention by the Secretary of Labor. This Court has approved this approach. *Calhoon v. Harvey*, 379 U. S. 134 (1964), *Wirtz v. Local 153, Glass Bottle Blowers Ass'n.*, 389 U. S. 463 (1968).

The Court below, however, affirms the issuance of a Temporary Restraining Order, at the suit of individual union employees, which enjoins a scheduled union election.

When Congress intended that the District Courts should have injunctive powers within the confines of this statute it makes express provision therefor. Indeed, several bills which would have authorized injunctions against future violations of the union election provisions were expressly

rejected by Congress. The principal House bills—including the version that passed the House—provided for a civil action "to prevent and restrain such violation (of Section 401)."[16] Both the administration's Senate bill and Senator McClellan's bill also provide for injunctions[17]. Nevertheless, the final Act did not provide injunctive relief for violation of Title IV.

It is no legal or logical answer to this point to say as the Court below that "in order to enforce rights of Union members with respect to a Union election, the election may be enjoined by a Temporary Restraining Order. *Calhoon v. Harvey*, 379 U. S. 134, 140 n. 13 (1964)." The precise question to be answered is whether the language of 481 (c) authorizes the District Courts to enjoin labor unions from holding elections at the time and place scheduled. By the normal use of intrinsic and extrinsic acids to statutory construction the answer is clearly, no.

An exchange between Senator John F. Kennedy and Senator Prouty[18] makes it abundantly clear that the remedy for a violation of the election requirements of Title IV is by recourse to the procedure found under the rubric, "Employment". It defies belief to contend that two days later the Senate granted federal courts the power to enjoin Union elections.

That the Court below would found jurisdiction to enjoin on Section 481 (c) by relying on a footnote in *Calhoon v. Harvey, supra*, ignores this Court's pronouncement in

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[16] H. R. 8342, 86th Cong., 1st Sess. Section 402 (a), 105 Cong. Rec. 15707-15708, 15887; H. R. 8400, 86th Cong. 1st Sess.

[17] S. 748, 86th Cong., 1st Sess., Section 403 (a), 105 Cong. Rec. 2666.

[18] II—Legislative History 1140.

Wirtz v. Local 153, Glass Bottle Blowers Ass'n., 389 U. S. 463 at 470 which, after enumerating the rights secured by Section 481 including the right to distribute campaign literature, teaches that the remedy of a violation should await exhaustion of the remedies enumerated in Section 482.

Section 483 makes the same point. Congress wished to give unions maximum latitude in resolving their own disputes before government intervention was possible. The fact that the injunction issued pursuant to Rule 65, Federal Rules of Civil Procedure can make no difference. Rule 65, if anything, should act as a limit on jurisdiction. Here the Rule was a vehicle for the emasculation of the overall policy of governmental restraint expressed in Title IV[19]. (The remedies provided by the Act were ultimately eschewed by the District Court. The Court reasoned in its Order, dated June 15, 1968, "that the post-election remedies are not adequate for the enforcement of plaintiffs' Section 481 (c) rights because they would result in delay and would require additional elements of proof not required in an action brought pursuant to the provisions of Section 481 (a) . . .," to wit a Temporary Restraining Order issued *ex parte* on the day of the scheduled election.)

The Congressional policy as expressed in Title IV is a keystone of federal labor policy. The ruling of the Court below represents an erosion of this policy which, if permitted to stand, would have profound effects upon the petitioners and on all other unions as well.

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[19] The remedies provided by the Act were ultimately eschewed by the District Court. The Court reasoned in its Order, dated June 15, 1968, "that the post-election remedies are not adequate for the enforcement of plaintiffs' Section 481 (c) rights because they would result in delay and would require additional elements of proof not required in an action brought pursuant to the provisions of Section 481 (a) . . .," to wit a Temporary Restraining Order issued *ex parte* on the day of the scheduled election.)

III. The decision of the Second Circuit is in direct conflict with the decision of another Court of Appeals on the same matter.

The decision of the Court of Appeals in the instant case is in direct conflict with that of *Brotherhood of Locomotive Firemen and Enginemen et al. v. United States*, 411 F. 2d 313 (5th Cir., 1969).

There, as in the instant case, the critical question to be resolved was whether service upon individuals of criminal contempt show cause orders was necessary to fully guarantee fundamental due process of law. The court held that failure to serve individuals "was no technical omission curable or to be cured by an actual awareness of those whom the blunderbus class action order was intended to bring in. 411 F. 2d 313, 318.

The Second Circuit held squarely that although the technical requirements of Rule 42 (b) of the Federal Rules of Civil Procedure were not met the failure to serve individual defendants was cured by the fact that Lambert was named in the Order for Contempt Judgment and that Colton had appeared in the original action (438 F. 2d 176, at 181, 182

There is, thus, a clear conflict between the Circuits over the notice and due process requirements involved in a criminal contempt proceeding.

IV. The findings of Civil Contempt and the damages therefore are erroneous.

The findings of Civil Contempt was made by the same jury and pursuant to essentially the same instructions and contained all of the errors of notice and procedure heretofore recited.

But not only was there no contempt, there were no damages. The damages in the sum of $4,700.00 were measured by the plaintiffs' attorney who was also Special Prosecutor. Testimony as to the fair and reasonable value of his attorney's fees and expenses in bringing on the Criminal and Civil contempt trials and the trial Court instructed the jury that plaintiffs were entitled to this recovery. The Court of Appeals states that the jury ignored their instruction. This is clearly contrary to the teachings of this Court in *Carpenters v. U. S.*, 330 U. S. 395.

Even more fundamentally the Court of Appeals ignored a settled line of its own decisions. *Board of Trade of City of Chicago v. Tucker*, 221 F. 305; *Christensen Engineering Co. v. Westinghouse Air Brake*, 137 F. 2d 774, 782 where the Court held:

> "It is obvious that a fine exceeding the indemnity to which the complainant is entitled is purely punitive. * * * We think that when it is imposed by way of indemnity to the aggrieved party it should not exceed his actual loss incurred by the violation of the injunction * * *"

The Court of Appeals decision herein is in clear conflict not only with its own prior decisions but with the Court of Appeals for the Seventh Circuit, *Federal Facilities Realty Trust*, 227 F. 2d 657 at 658, and indeed with the holdings of every other Court of Appeals which has considered the subject.

Conclusion

The decision below sanctioned severe and prejudicial departures from the regular course of judicial proceedings, created a clear conflict between circuits on an issue involving fundamental guarantees of due process of law, and created a grave risk of eroding the Congressional preference for the self-regulation of intra-union affairs as expressed in Section 401 *et seq.* of the Labor-Management Reporting and Disclosure Act. Certiorari should be granted to the end that the decision below is reversed.

Respectfully submitted,

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Opinion.

MacMAHON, District Judge.*

This is a motion for judgment notwithstanding the verdict, pursuant to Rule 50(b), Fed. R. Civ. P., as to all defendants who were found guilty by a jury of civil contempt, and a motion for a judgment of acquittal, pursuant to Rule 29, Fed. R. Crim. P., as to two defendants, Rudy Colton and Ervin B. Lambert, who were found guilty by the same jury of criminal contempt.

Plaintiffs, members of defendant Local 281, United Brotherhood of Carpenters and Joiners of America and candidates in the June 6, 1968 election of union officers, brought an action against defendants, Local 281, Rudy Colton, the president, Duane Kane, the vice president, Sebastian Paterninti, the treasurer, and the Election Committee and its chairman, Julius Amadio. The suit was to enforce plaintiffs' rights to equal treatment in the distribution of campaign literature under Section 401 of the Labor Management Reporting & Disclosure Act.[1]

The Honorable Edmund Port, United States District Judge for the Northern District of New York, at approximately 10:30 A.M. on June 6, 1968, signed a temporary restraining order enjoining defendants, pending a determination of plaintiffs' main claim, from holding the election scheduled to commence at 1:00 P.M. on June 6, 1968.

There was evidence from which the jury could have found the following facts beyond a reasonable doubt:

Judge Port telephoned the union headquarters in Binghamton, New York and spoke with Elizabeth J. Wilke,

* Of the Southern District of New York, sitting by designation.

[1] 29 U. S. C. § 481.

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office secretary for Local 281. He asked to speak with either Mr. Rudy Colton, the union president, or Mr. Ervin B. Lambert, the business representative. Mrs. Wilke replied that neither man was available. Judge Port then notified Mrs. Wilke that she should inform Mr. Colton and Mr. Lambert that he had just signed an order restraining the impending election and that they could reach him by telephone in his chambers in Auburn, New York, to verify the message. Mrs. Wilke wrote the message on a piece of paper and handed it to Mr. Lambert at 12:30 P.M. She told him that it was an important message for Mr. Colton, and Mr. Lambert said he would see to it that Mr. Colton received the message. Neither man ever telephoned Judge Port to verify or clarify the relayed message.

Judge Port appointed Angelos P. Romas, Esq., attorney for plaintiffs, to serve the order to show cause containing the temporary restraining order on the union at 1:00 P.M., or as soon as possible before 6:00 P.M., on June 6, 1968.

Mr. Romas, acompanied by Mr. Leslie, served the order on Rudy Colton at approximately 1:00 P.M. At the time, Colton and Lambert were standing next to each other. Mr. Romas explained to both of them that the paper he had just served was a temporary restraining order, signed by Judge Port, enjoining the impending election. According to both Mr. Leslie and Mr. Romas, the doors had just been opened to the area where the election balloting was to take place, and no one had as yet entered.

The election proceeded in spite of the restraining order.

Defendants were tried for criminal contempt on September 25, 1969, in Syracuse, New York. The jury found only defendants Lambert and Colton guilty and acquitted the remaining defendants.

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On September 26, 1969, defendants were tried for civil contempt, and the jury found all defendants guilty and awarded plaintiffs, $4,700. We reserved decision on defendants' motions for judgment of acquittal and judgment notwithstanding the verdict until submission of briefs. Sentencing was deferred until after decision of the motions.

Although there are different procedures for the trial of civil and criminal contempts, the classification of conduct as constituting a civil contempt or a criminal contempt is difficult because the distinction between them does not depend on the nature of the conduct, but rather on the purpose for the proceeding.[2] If the purpose is remedial, either to coerce compliance or to compensate an aggrieved party, then the proceeding is said to be civil. If, however, the purpose is punitive, then the proceeding is said to be criminal.[3] Unfortunately, when the contempt is not committed in its presence, it is impossible for the trial court, before hearing the evidence, to determine whether the purpose of the proceeding will be to coerce compliance, to compensate an aggrieved party or to punish a wrongdoer.[4] Often, the same conduct can amount to both civil and criminal contempt because it may justify a court in resorting to both remedial and punitive measures. In such a case, both the civil and criminal charges may be tried together, as long as this does not result "in substantial prejudice" to defendant.[5]

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[2] *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441 (1911); Civil and Criminal Contempt in the Federal Courts, 17 F. R. D. 167, 168.

[3] *Ibid.*

[4] *United States v. United Mine Workers of America*, 330 U. S. 258, 298-299 (1947).

[5] *United States v. United Mine Workers of America*, *supra*, at 299-300.

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Here, defendants were charged with "deliberate" disobedience of a court order restraining an election. The order to show cause initiating this action requested both remedial and punitive relief, and, therefore, we were involved with that type of conduct which can constitute both civil and criminal contempt.

The dual nature of the charge created a risk, not only of prejudicing the defendants, but also of confusing the jury as to the different burdens of proof and the different elements of the charge. We, therefore, tried the criminal contempt first, and after the jury returned its verdict, we tried the civil contempt to the same jury. Defendants do not claim, nor do we find from a careful review of the record, any prejudice to them from this mode of procedure.[6] We turn now to defendants' contentions.

Some of defendants' arguments relate to both the criminal and civil contempt, others only to the criminal, and still others only to the civil. We will, therefore, for the purpose of clarity, first consider the arguments relating to both aspects of the contempt, then the arguments affecting only the criminal, and then those affecting only the civil.

Defendants contend, in support of both the motion for judgment of acquittal on the criminal side and the motion for judgment notwithstanding the verdict on the civil side, that the temporary restraining order was invalid because the court lacked jurisdiction *in personam* and over the subject matter, the order "completely determined the issue" in question, the order was too vague to comply with Rule 65, Fed. R. Civ. P., and the order enjoined officers,

[6] *Ibid.*

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and not just the union, contrary to 29 U. S. C. § 481(c). Defendants also contend that the evidence was insufficient because "there was no proof that it was the duty of the officers or agents of the union to run the election." Defendant Lambert contends that he was not named in the injunction, he was not a union officer and was, therefore, not bound by the order.

Defendants' argument that the court issuing the injunction order lacked jurisdiction is without merit. The argument is grounded on defendants' claim that they were only served with a temporary restraining order, but never served with a summons. It is clear, however, that defendants appeared before Judge Port on June 12, 1968, at an evidentiary hearing held to determine whether a preliminary injunction should issue, and made no objection at that time to lack of jurisdiction over their person. This constituted a waiver of any objection they might have had to the court's *in personam* jurisdiction.[7]

Defendants predicate their claim of lack of subject matter jurisdiction on the assertion that a complaint had not been filed before the temporary restraining order was served and that a district court is without power to enjoin a union election.

The first assertion is without basis in fact because the complaint was filed with Judge Port before issuance of the temporary restraining order.[8]

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[7] See *Engineers Ass'n v. Sperry Gyroscope Co.*, 251 F. 2d 133, 135 (2d Cir. 1957), *cert. denied*, 356 U. S. 932 (1958); *Hadden v. Rumsey Prods., Inc.*, 196 F. 2d 92, 95 (2d Cir. 1952); 2 Moore, Federal Practice ¶ 3.04. p. 718 (2d ed. 1968).

[8] Rule 5(e), Fed. R. Civ. P.; *Gillson v. Vendome Petroleum Corp.*, 35 F. Supp. 815, 819 (E. D. La. 1940).

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The second assertion is without basis in law because Congress has specifically granted district courts jurisdiction to enforce "all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization."[9]

Defendants' remaining nonjurisdictional challenges to the validity of the temporary restraining order are misguided. The validity of an order issued by a court of competent jurisdiction is not open to collateral attack in a contempt proceeding based on disobedience of that order.[10] If defendants thought the temporary restraining order erroneous, their remedy was not to disobey it, but to seek direct review.[11] Those who disobey a court order do so at their peril, whether or not the order is valid, so long as the court issuing it has jurisdiction. Defendants, having failed to appeal from the judgment signed by Judge Port on June 15, 1968, are now foreclosed from challenging the correctness of the temporary restraining order.

In any event, defendants' objections to the propriety of the temporary restraining order are without merit. The temporary restraining order did not "completely determine the issue," as defendants claim, but rather served the traditional function of a temporary restraining order to maintain the *status quo* pending hearing of the motion

[9] 29 U. S. C. § 481(c); *Calhoon v. Harvey*, 379 U. S. 134, 140 n. 13 (1964).

[10] *United States v. United Mine Workers of America*, *supra*, at 293; *Howatt v. Kansas*, 258 U. S. 180, 189 (1922); 7 Moore, Federal Practice ¶ 65.02[4], p. 1616 (2d ed. 1968).

[11] *Bullock v. United States*, 265 F. 2d 683, 690 (6th Cir.), *cert. denied*, 360 U. S. 909 (1959).

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for a preliminary injunction.[12] Nor was the order vague. It unequivocally prohibited defendants from proceeding with Local 281's election of officers scheduled to commence at 1:00 P.M. on June 6, 1968. Finally, there is no statutory prohibition against enjoining union officers as well as the union from conducting an election.[13]

Defendants' next contention, that the evidence was insufficient because there was no proof that the officers had a duty to run the election, is also without merit.

There was testimony applicable to both the civil and criminal contempt proceedings that Rudy Colton was president, Duane Kane was vice president, and Ervin Lambert was business agent. As to Colton and Lambert, there was direct evidence on both the criminal and civil charge of their actual knowledge of the temporary restraining order prior to the commencement of the election. As to Kane and Amadio, the Chairman of the Election Committee, there was sufficient circumstantial evidence on the civil charge for the jury to draw the inference that they had knowledge of the temporary restraining order prior to the commencement of the election.

This evidence alone was sufficient *prima facie* to prove that Colton and Lambert, on the criminal side, and Colton, Lambert, Kane and Amadio, on the civil side, violated the temporary restraining order. If these men were without power to prevent the election, it would be a fact peculiarly within their knowledge placing the burden on them to introduce some evidence of it.[14] No such evidence was introduced.

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[12] *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 742 (2d Cir. 1953); 7 Moore, Federal Practice ¶ 65.04[1], p. 1625 (2d ed. 1968).

[13] 29 U. S. C. § 481(c). See 29 U. S. C. § 411(a)(1); *Libutti v. Di Brizzi*, 233 F. Supp. 924 (E. D. N. Y. 1964)

[14] *United States v. Bull S. S. Line*, 146 F. Supp. 210 (S. D. N. Y. 1956); 9 Wigmore, Evidence § 2486, p. 275 (3d ed. 1940).

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Our own careful review of the record indicates, however, that there was no evidence whatever that defendant Sebastian Paterninti was even a member, much less an agent or officer, of the union. The motion for judgment notwithstanding the verdict on the civil contempt is, therefore, granted as to defendant Paterninti.

Defendant Lambert argues that he was not bound by the temporary restraining order because he was not named in the order and was not an officer of the union.

The temporary restraining order enjoined the union, and its mandate would apply to all agents of the union who had actual knowledge of the order.[15] There was uncontradicted testimony that Lambert was the union's business agent. There was also testimony that prior to the commencement of the election, Mrs. Wilke relayed to Lambert Judge Port's message and that Lambert was present when Colton was served with the temporary restraining order.

This evidence was more than sufficient, under both the criminal and civil burdens of proof, for the jury to find that Lambert was an agent of the union who had actual knowledge that the election was enjoined and was, therefore, bound by the temporary restraining order.

We now turn to consider defendants' arguments relating to the criminal contempt.

Defendants Colton and Lambert contend that they were not informed of the criminal nature of the contempt accu-

[15] See *Reich v. United States*, 239 F. 2d 134, 137 (1st Cir. 1956), *cert. denied*, 352 U. S. 1004 (1957); *Radio Corp. of America v. Cable Radio Tube Corp.*, 66 F. 2d 778, 781 (2d Cir. 1933), *cert. denied*, 290 U. S. 703 (1934).

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sations against them, in violation of the Fourth, Fifth and Sixth Amendments of the Constitution and as required by Rule 42(b), Fed. R. Crim. P.

Rule 42(b), Fed. R. Crim. P., embodies the constitutional requirements sufficient to inform the accused of an accusation of criminal contempt.[16] The rule requires that trials for criminal contempt be prosecuted on notice stating the time and place of hearing, allowing a reasonable time for preparation of the defense, stating the essential facts and describing the act as a criminal contempt. Notice can be given orally by the Judge, or by an order to show cause applied for either by the United States Attorney or an attorney appointed by the court for that purpose.

Notice was here given by an order to show cause, on application of an attorney subsequently appointed to prosecute defendants for criminal contempt. The order stated that defendants were directed to show cause why they should not be *punished* for contempt because "of their misconduct in *deliberately* disobeying and refusing to comply with and carry out the provisions of the order . . . . . dated June 6, 1968 . . . which enjoined the contemnors from holding the election of Local 281 scheduled for June 6, 1968."

The order, therefore, set out the essential facts alleged to have constituted the contempt and did seek punitive, and not merely remedial, vindication. However, Rule 42 (b) requires that the notice issuing to the defendants describe the contempt charged as a criminal contempt. As defendants note, this order did not specifically label the contempt as criminal.

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[16] See *Yates v. United States*, 316 F. 2d 718, 723 (10th Cir. 1963).

APPENDIX A.

Omission of a specific description of the contempt as criminal is not, however, fatal if defendants actually know that the proceeding will be criminal and are not prejudiced by the technical omission.[17]

There can be no question of lack of knowledge here, because the order to show cause, although it did not charge wilful and intential disobedience, did charge deliberate disobedience and sought punitive relief. More significantly, the attorney for defendants, on August 8, 1969, more than a month prior to trial, advised the court in writing that he was available for trial from September 22 to October 3, 1969, or from October 20 to October 31, 1969, and that he was renewing all motions "which I now deem appropriate in view of your ruling that this matter raises a criminal contempt."

In the face of this admission that defendants were fully aware that the charges against them were criminal, despite their claims to the contrary, they were not prejudiced by the fact that the title and docket number were civil, and that Judge Port had mistakenly stated nine months earlier that the case was civil in nature.

Although the dual nature of the proceeding was not absolutely clear until a month and a half before the trial commenced, the same factual presentation and defenses were required for both charges, and defendants do not claim prejudice in the preparation of their defense, nor can they in light of their attorney's letter.[18]

This brings us to defendants' final argument which relates only to the civil contempt.

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[17] *United States v. United Mine Workers of America*, *supra*, at 297.

[18] *United States v. Aberbach*, 165 F. 2d 713, 714 (2d Cir. 1948) (only ten days' notice of dual nature of contempt proceeding held sufficient).

APPENDIX A.

Defendants contend that plaintiffs were not entitled, as a matter of law, to an award for damages, costs and attorney's fees. This is simply incorrect.

Civil contempt is remedial, and a court has power to award damages and attorney's fees to a party aggrieved by the contempt,[19] limited to the actual loss caused by the contempt plus the costs and expenses, including counsel fees, incurred in investigating and prosecuting the contempt.[20]

Defendants make no claim that the evidence was insufficient to support the jury's award, that the award was excessive, or that the charge was in error as to damages.

Accordingly, the motion for judgment notwithstanding the verdict is granted as to defendant Sebastian Paterninti and denied as to all other defendants. There being no just reason for delay, the Clerk of the Court is directed to enter judgment dismissing the civil contempt against Sebastian Paterninti.

Defendants Lambert and Colton's motion for judgment of acquittal is denied. Defendants are directed to appear for sentencing in Utica, New York, on February 4, 1970, at 10:30 A.M., or at such time and place within the Northern District of New York, as the court may hereafter direct.

So ordered.

Dated: New York, N. Y., December 29, 1969.

LLOYD F. MacMAHON,
United States District Judge.

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[19] *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714 (1967).

[20] *Babee-Tenda Corp. v. Scharco Mfg. Co.*, 156 F. Supp. 582, 587 (S. D. N. Y. 1957).

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 76-80—September Term, 1970.

(Argued October 6, 1970 Decided December 29, 1970.)

Docket Nos. 34771-75

ANDREW BACKO, MIKE KARAMAN, CASMIR MACKO, JAMES BARNO and ERCELL CUMMINGS,

Plaintiffs-Appellees,

—against—

LOCAL 281, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, RUDY COLTON, Individually and as President of Local 281, DUANE KANE, Individually and as Vice President of Local 281,

Defendants-Appellants,

—and—

ERVIN B. LAMBERT,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

—against—

RUDY COLTON and ERVIN B. LAMBERT,

Defendants-Appellants.

APPENDIX B.

Before:

MOORE, SMITH and ANDERSON, *Circuit Judges.*

Appeal from judgments of civil and criminal contempt. The judgment of criminal contempt was filed on December 31, 1969, and the judgment of civil contempt was filed on January 29, 1970, in the United States District Court for the Northern District of New York after a trial before Lloyd F. MacMahon, *Judge,* of the United States District Court for the Southern District of New York, sitting by designation, and a jury, on September 24-25, 1969.

Affirmed.

THOMAS P. MCMAHON, Buffalo, N. Y. (McMahon and Crotty, Buffalo, N. Y., of counsel), *for Local 281 and Ervin B. Lambert, Defendants-Appellants.*

On the joint brief for Rudy Colton and Duane Kane as Defendants-Appellants, STEPHEN J. PAWLINGA, Utica, N. Y.

ANGELOS PETER ROMAS, Endicott, N. Y., *for Plaintiffs-Appellees in the civil contempts and for the United States of America, Plaintiff-Appellee in the criminal contempt.*

MOORE, *Circuit Judge*:

This is an appeal brought by defendants Ervin B. Lambert, Duane Kane, Rudy Colton and Local 281, United Brotherhood of Carpenters and Joiners of America, A.F.L. C.I.O. (the Union) from the judgment of civil contempt

entered against them on January 29, 1970 and by Ervin B. Lambert and Rudy Colton from the judgment of criminal contempt entered against them on December 31, 1969.

The dispute which led to the contempt judgment arose out of a Union election. Plaintiffs were candidates for elective office in Local 281. The election was to be held on June 6, 1968. Pursuant to Section 401(c) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 481) (the Act), plaintiffs made a request that the Union distribute campaign literature by mail at the candidates' expense. The Union refused on the grounds that the material contained allegations which were incorrect. Julius Amadio, acting as the Union's Election Committee chairman, made this known to plaintiffs in a letter dated June 3, 1968. It was not until the morning of June 6th that plaintiffs decided to bring this action. Plaintiffs presented a complaint and a proposed "Order to Show Cause and Temporary Restraining Order" to Judge Edmund Port at his chambers in Auburn, New York. The testimony is unclear as to exactly what Judge Port did with the complaint. However, on the complaint as well as on the show cause order and temporary restraining order which Judge Port signed, it is noted on the top left in ink: "Filed 6/6/68, [at] 10:33 A.M. at Auburn, New York [signed] E. Port, U.S.D.J." The docket entry of the Clerk states that a summons and complaint was filed on June 6, 1968. This constitutes prima facie evidence that the complaint was filed by Judge Port at the time noted and there is nothing in this record to rebut that fact. Judge Port signed the order to show cause and temporary restraining order and it was served on defendant Rudy Colton, the Union president, at the hall where the election was about to be held in Binghamton, N. Y. According to a docket entry dated June

18th, the return of service indicated that along with the Order to Show Cause and Temporary Restraining Order, a copy of the complaint was also served. Although the testimony of plaintiffs' lawyer, Angelos Peter Romas, as to the exact papers served on Colton is vague and does not specifically indicate that the complaint was included therein, we again find no evidence to the contrary and conclude that the docket entry was accurate, and that the time of such service was, as indicated in the testimony of the plaintiffs' witnesses, namely, just prior to the start of the meeting at 1:00 P.M.

Meanwhile, between 11:30 and 12:00 that morning, Judge Port made a telephone call to Colton's office. He spoke to Mrs. Betty Wilke, a secretary at the office of Local 281 in Binghamton, New York. Judge Port informed Mrs. Wilke of the order he had just signed, and requested that either Colton or Lambert return his call. This was not done, although Lambert was given the message at 12:30, which message Lambert said he considered "unimportant." At 1:00 P.M. when Colton was served, Lambert was standing next to him. Mr. Romas told Colton that he was deputized by Judge Port to serve the order. Lambert told Colton that he should put the paper in his pocket and talk to the lawyers later. Later that evening, copies of the papers were also served on the defendant Duane Kane. This was at 7:30 P.M. before the polls had closed. In addition to Kane, vice-president of the Union and member of the election committee, other members of said committee not involved in this appeal were also served. The testimony was that all of them treated the papers as "a big joke."

The election was held as scheduled despite the Temporary Restraining Order which prohibited the holding of

the election. Neither Colton nor Lambert were on the election committee but they did and still do hold the two most important positions in the Union: President and Business Manager, respectively. Defendants claimed they had no power to stop the election but the jury obviously found otherwise.

On June 12 and 13, 1968, a hearing was held on the Order to Show Cause why a preliminary injunction should not be granted. Judge Port nullified the election, and ordered that a new election be held on June 27th and that plaintiffs' literature be distributed by the Union. The defendants did not appeal that decision. The election was held and the plaintiffs' slate was defeated.

That settled the question of who was to run the Union, but did not end the litigation. Contempt proceedings were begun by order to show cause and after the issuance of a "Second Amended Order to Show Cause" on September 3, 1968, returnable September 23, 1968, a preliminary hearing was held. Subsequently, on July 23, 1969, Judge Port appointed attorney Romas as Attorney for the United States of America, *nunc pro tunc* for the purpose of prosecuting defendants for criminal contempt. It soon became clear that both civil and criminal contempt judgments were being sought. Separate trials were held by Judge Lloyd F. MacMahon for the criminal and civil complaints. The criminal trial came first and the same jury was used in both cases. The record in the civil contempt includes the record from the criminal side, a practice which seems appropriate since the same facts and fact finders were present in both cases.

Defendants make numerous allegations of error, which we will now discuss.

APPENDIX B.

I.

Existence of the Writ

It is contended that there was no sufficient proof that a valid restraining order was issued, although the order was introduced into evidence. The issuance of the writ was the subject of testimony by plaintiffs' lawyer, Romas, but it is argued that such testimony must be disregarded since Romas, as the prosecutor in the criminal contempt, should not have testified. *United States* v. *Alu*, 246 F.2d 29, 33-34 (2d Cir. 1957). However, this is not an absolute rule, and special circumstances will justify testimony by the prosecution. *United States* v. *Socony Vacuum Oil Company*, 310 U.S. 150, 240-42 (1940); *Greenberg* v. *United States*, 280 F.2d 472, 475 (1st Cir. 1960). Here where Romas had co-counsel present the summation in both trials, where he was appointed *nunc pro tunc*, and where the basic items to which he testified were jurisdictional prerequisites, most of which were solely within his knowledge and the knowledge of Judge Port, the testimony was proper. In any event, the docket entry referring to the writ is prima facie evidence of its existence, and such prima facie showing has not been rebutted. Defendants' contention that there can be no writ without the seal of the Court is without merit.

II.

Validity of the Writ

Defendants' next set of contentions relates to the jurisdiction of the Court in relation to the issuance of the Temporary Restraining Order. It is first suggested that the Court was without jurisdiction to issue such order because no action had been commenced. However, a complaint was

filed at the same time, thereby commencing the action and giving the Court jurisdiction to issue the order.

In order to enforce rights of Union members with respect to a Union election, the election may be enjoined by a temporary restraining order. *Calhoon* v. *Harvey,* 379 U.S. 134, 140 n. 13 (1964). *Sheridan* v. *United Brotherhood of Carpenters,* 194 F. Supp. 664 (D. Del. 1961), rev'd on other grounds 306 F.2d 152 (3d Cir. 1962). While it may be that under certain circumstances the possibility of post-election relief will prevent a finding of irreparable injury, we cannot say that the District Court was clearly erroneous in its assumption that irreparable injury would have resulted in this case had the Temporary Restraining Order not been granted.

Defendants also argue that the Court had not obtained *in personam* jurisdiction over anyone at the time of the service of the show cause order and temporary restraining order. Although normally a summons must be issued and served in order to obtain *in personam* jurisdiction, here *in personam* jurisdiction was obtained by the service of the Temporary Restraining Order and complaint. The parties were in Auburn, New York where there was no court Clerk, and since the Clerk is designated as the proper person to issue a summons, Fed. R. Civ. P. 4(b), it is clear that Judge Port felt it best to advise plaintiffs to use the order itself to obtain jurisdiction over the persons to whom the order was addressed. Where an order and complaint are properly served on an individual, he is placed within the jurisdiction of the Court for the purposes of that order. Cf. *Jacobson Coon* v. *National Bank of Detroit,* 165 F.2d 565, 567 (6th Cir. 1948). Although the form of the order, naming only the Union "et al." may have left others in doubt as to whether they were parties in the civil action

which had just been commenced, it is unnecessary to decide whether this caption precludes a finding that jurisdiction was obtained over one or more of the individual defendants, since they are responsible in any event, as agents of defendant Union who were on notice as to the contents of the order. As Judge Learned Hand said in *Alemite Mfg. Corporation* v. *Staff*, 42 F.2d 832 (2d Cir. 1930):

> "... a person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well settled law."

III.

Disobedience of the Order

The individual defendants argue that they cannot be held in contempt because there was no disobedience of the order by the individual defendants. However, the Union was brought under the jurisdiction of the Court when the order was served on its president, Colton, and its servants who had notice of said order were under a duty to obey the order. There is no doubt that all three had such knowledge since two were personally served with the order and the other, Lambert, had a message from Judge Port regarding the order and was standing next to Colton when he was served. Lambert, Colton and Kane held positions in the Union which suggested prima facie that they had power to effect compliance with the order. To be held liable in contempt, it is necessary that a non-party respondent "must either abet the defendant, or must be legally identified with him" (as here). *Alemite Mfg. Corporation* v. *Staff, supra*, 42 F.2d at 833. Furthermore, all three individual defendants affirmatively caused the order to be vio-

lated, in that they clearly evidenced a desire that the order should be disregarded. Kane did this by treating the order with which he was served as a "big joke" and Lambert and Colton evinced a similar attitude when Colton, on instructions from Lambert, put the Order in his back pocket apparently without reading it. The jury evidently concluded that defendants did violate the order, a finding which we cannot say was not based on supporting proof.[1]

IV.

The Criminal Contempt

Defendants challenge the procedure on the trial for criminal contempt. Criminal contempt is to be punished in accordance with Fed. R. Crim. P. 42. Since the action here was not committed in the presence of the Judge, the applicable section is 42(b). This rule states:

> "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an order to show cause or an order of arrest. The defendant is entitled to trial by jury in any case in which an Act of Congress so provided . . . ."

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1 Since we find that defendants affirmatively took action which prevented the order from being obeyed, it is not necessary to consider whether they would have been equally liable or guilty if only passive action was involved.

APPENDIX B.

The Second Amended Order to Show Cause, relied on by plaintiffs, does not by itself comply with the above quoted rule. The persons to be cited were named as "Ervin B. Lambert and the defendants." The "defendants" clearly included Colton who had appeared in the June 13th trial as a named defendant in the original complaint. The order set forth "the essential facts constituting the criminal conduct," that being the disobedience of the order. The *United Mine Workers* case, *supra,* 330 U.S. at 297, held that formal notice that the contempt will be criminal in nature may be dispensed with where no substantial prejudice results. Here, at the time of the service of the Second Amended Order to Show Cause, it is clear that even attorney Romas was unsure whether he desired to characterize this action as criminal or civil or both.[2] As time went on, however, Romas decided it was to be both. Judge Port's order appointing Romas as special government prosecutor confirmed that criminal contempt was involved. A letter from attorney McMahon dated August 8, 1969 showed that by that time, he was fully aware that a criminal as well as civil contempt was to be prosecuted. Assuming that McMahon was representing both Colton and Lambert, we think that this evidence of his being notified satisfies the requirements of Rule 42(b), and the evidence shows that Lambert and Colton were in fact represented by McMahon both before and during the trial for criminal contempt. In a letter dated September 19, 1968, McMahon stated that he was "retained as counsel in the matter." At the preliminary hearing on September 23, 1968, the Court asked McMahon, "[Do] you appear for him [Lambert]?" The reply was, "I do." Lambert at that time sat in the Court

2 At the hearing on September 23d, Romas' indecision as to the nature of the contempt was finally met by the rejoinder of Judge Port, "All right. Both of you will need time to brief it."

APPENDIX B.

Room and did not in any way contradict this statement. Colton was also present at that time, and did not object when McMahon, the only lawyer present on behalf of the defense, stated, "The defendants are prepared" (emphasis supplied). The record also shows that both were present at the contempt trial.

Any defect in the mode of compliance with Fed. R. Crim. P. 42(b) was waived by defendants when no motion was made until after the jury was picked and the opening statements were completed. Fed. R. Crim. P. 12(b)(2) and (3). *Pon* v. *United States*, 168 F.2d 373 (1st Cir. 1948). Nor were defendants denied counsel since McMahon in fact ably represented them at all critical stages of the proceedings.

V.

The Civil Contempt

Jurisdiction was obtained in the civil contempt because of the presence of all defendants at trial, the failure to interpose proper objection as required by Fed. R. Civ. P. 12(h)(1) and in the case of defendants other than Lambert, jurisdiction was obtained when they appeared in connection with the trial of June 12 and 13, 1968, since the civil contempt was, in effect, a continuation of that case.

For the first time on appeal, defendants suggest that the civil contempt was improper because final judgment had been rendered as to the original complaint, and the injunction, requiring that plaintiffs' literature was to be distributed under certain conditions, and requiring that the election be held on June 28, 1968 was not disobeyed. This contention results from a failure properly to differentiate between civil contempt of a coercive nature and civil contempt of a compensatory nature. Where a civil contempt

proceeding is coercive in nature and seeks to enforce an interlocutory order, it abates when the proceedings out of which it arises are terminated. *Shillitani* v. *United States*, 384 U.S. 364, 370, 371 (1966); *F.T.C.* v. *Stroiman*, 428 F.2d 808 (8th Cir. 1970); *Harris* v. *Texas and Pacific Ry.*, 196 F.2d 88 (7th Cir. 1952); *De Parq* v. *United States District Court*, 235 F.2d 692, 697 (8th Cir. 1956). No such rule applies to purely compensatory civil contempt judgments.[3] This principle is illustrated in *Parker* v. *United States*, 135 F.2d 54 (1st Cir. 1943), *cert. denied* 320 U.S. 737 (1943) where the court found the defendant liable, in a post-judgment civil contempt proceeding for damages due to disobedience of both an interlocutory and final order. See also *Vincent* v. *Local 294, International Brotherhood of Teamsters*, 424 F.2d 124, 129 (2d Cir. 1970),[4] but see *Pacific Gamble Robinson* v. *Minneapolis and St. Louis Ry. Co.*, 92 F. Supp. 352 (D. Minn. 1950).

The damage award was civil in nature and included compensation for certain extra expenses to which plaintiffs were put because of the disobedience of the temporary restraining order, for the period subsequent to the final judgment filed on June 17, 1968, including the cost of prosecuting the contempt. These were proper items for compensation. *Toledo Scale* v. *Computing Scale Co.*, 261 U.S.

3 When the parties choose to effect an out-of-court settlement of a case, unless the settlement specifically states otherwise, all elements of that litigation are deemed settled, including any right to seek a compensatory civil contempt judgment. *Gompers* v. *Buck Stove and Range Company*, 221 U.S. at 418, 451 (1911). A final judgment in a case does not "settle" a right to sue for contempt, at least with respect to damages incurred after the date of the final judgment, unless the judgment so states.

4 In that case, it was found that the sanction for civil contempt abated with the expiration of the injunction which was being disobeyed "[s]ince the *sole* purpose of the civil contempt order was to *compel compliance* with the injunction order" (emphasis supplied).

APPENDIX B.

399, 426-28 (1933); *Fleischman Corp.* v. *Meier Brewing Co.*, 386 U.S. 714, 718 (1967); *Lichenstein* v. *Leichenstein*, 425 F.2d 1111 (3d Cir. 1970); *N.L.R.B.* v. *Local 825, International Union of Operating Engineers*, 430 F.2d 1225 (3d Cir. 1970).[5]

VI.

Conclusion

We have considered defendants' other contentions and conclude they are without merit. The judgments in both the civil and criminal contempts are affirmed. In the exercise of our discretion, we deny plaintiffs' request for counsel fees on appeal.

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5 We do not think that plaintiffs are entitled to compensation for the services of their attorney in his capacity as prosecutor for the United States, *nunc pro tunc*. Of course, in a proper case, compensation might be paid to the attorney himself, for services in this capacity, from the fines collected by the government from the defendants in the criminal contempt. No such fines were levied here. We note that the jury clearly omitted this item from its computation of damages in the civil contempt, and as such, we feel that the Court's charge indicating this to be a proper item of damages in the civil case to be harmless error.

APPENDIX C.

Second Amended Order to Show Cause and for Contempt Judgment.

(Same Title.)

Upon the annexed Affidavit of Angelos Peter Romas, an Attorney at Law, and upon a prior Order To Show Cause dated July 22, 1968, and Amended Order to Show Cause dated August 28, 1968, signed by Judge Edmund Port and the Affidavit annexed thereto, and the Show Cause Order dated June 6, 1968, issued at Auburn, New York, by Edmund Port, United States District Judge, it is

ORDERED, that the defendants, and Ervin B. Lambert, Business Representative of Local 281, United Brotherhood of Carpenters and Joiners of America (hereinafter referred to collectively as "Contemnors"), Show Cause at a Motion Term of this Court, to be held in the Federal Court Room at the United States Post Office Court House Building at Utica, New York, at 10:00 A. M. in the forenoon on October 28, 1968, or as soon thereafter as counsel can be heard, why the said Contemnors should not be punished for a Contempt of this Court because of their misconduct in deliberately disobeying and refusing to comply with and carry out the provisions of the Order to Show Cause and Temporary Restraining Order, dated June 6, 1968, issued by Edmund Port, United States District Judge, in Civil Action No. 68-CV-186, which enjoined the Contemnors from holding the election of Local 281 scheduled for June 6, 1968, and why an Order should not be issued declaring the said election of Local 281, United Brotherhood of Carpenters and Joiners of America, Binghamton, New York held on June 6, 1968, in violation of the Temporary Restraining Order, as being null and void and of no effect; and why an Order should not be granted directing the

APPENDIX C.

Contemnors to pay damages to the Plaintiffs, and also to pay Plaintiffs' counsel fees, costs and other expenses necessarily incurred in connection herewith, and that this Honorable Court grant such other and further relief and punishment as is just and proper under the circumstances.

Service of a copy of this Order to Show Cause, together with the papers upon which it is based, upon the attorneys for the defendants and upon Irvin B. Lambert, on or before October 21, 1968, shall be deemed sufficient.

Dated: Auburn, New York, October 1, 1968.

S/ EDMUND PORT,
United States District Judge.

APPENDIX D.

Order to Show Cause and Temporary Restraining Order.

Upon the verified Complaint and the Affidavits of William Leslie, George Petkash, Andrew Backo, Casimir Macko, Mike Karaman and James Barno, and the Certificate of Angelos Peter Romas, Attorney for plaintiffs, attached hereto, it is

ORDERED that the defendants show cause before this Court, at Auburn, New York, on June 12, 1968, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein enjoining the defendants from proceeding with the Elec-

APPENDIX D.

tion of Officers for Local 281, United Brotherhood of Carpenters and Joiners of America, Binghamton, New York, until such reasonable time has elapsed from the date that defendants have mailed plaintiffs' campaign literature and all other candidates' campaign literature, all as required by Section 401(c) of the Labor-Management Reporting and Disclosure Act 29 U. S. C. 481; and

It appearing to the court that defendants are about to commit the acts hereinafter specified and that they will do so unless restrained by order of this court, and that immediate and irreparable injury, loss, and damage will result to the plaintiffs before notice can be given and the defendants or their attorneys can be heard in opposition to the granting of a temporary restraining order, in that plaintiffs will have been deprived from distributing campaign literature in the June 1968 election; and it is further

ORDERED that defendants and its agents, servants, employees, attorneys and all persons in active concert and participation are hereby restrained from holding the election for Local 281, United Brotherhood of Carpenters and Joiners of America scheduled on Thursday, June 6, 1968; or from tallying the votes, if any are cast prior to service of this order and it is further

ORDERED, that this order expire within 10 days after entry unless within such time the order for good cause shown it is extended for a like period, or unless defendants consent that it may be extended for a longer period; and it is further

ORDERED that service of this Order to Show Cause together with the copy of the papers hereto attached and

APPENDIX D.

together with the Complaint in this action be made on Defendant Local 281 by service upon any officer or business agent on or before June 6, 1968 at 1:00 P. M. o'clock and or as soon thereafter and before 6:00 P. M. upon the other defendants on or before June 10, 1968, and it is further Ordered that a Bond be and the same hereby is dispensed with and it is further

ORDERED that Angelos P. Romas be and he hereby is appointed to serve the Summons and Complaint and Show Cause Order. Said service being deemed adequate if made by him.

Issued at 10:33 A. M., June 6, 1968, Auburn, N. Y.

s/ EDMUND PORT,
United States District Judge.

APPENDIX E.

Judgment.

The above-entitled action came on for trial before the court, without a jury, on June 12 and June 13, 1968, at Auburn, New York, all of the plaintiffs appearing by Angelos P. Romas, Esq., their attorney, and all of the defendants appearing by Pearis, Resseguie, Hogan & Kline (John B. Hogan, Esq. of counsel), and the testimony of all of the parties having been submitted, and the court having dictated its decision, findings of fact and conclusions of law on the record in open court, and it appearing that a refusal to grant relief to the plaintiffs herein would result in their irreparable injury and would be against the public interest, in that, the plaintiffs would be required to submit their candidacies to the members of the defendant Local without the distribution of their campaign literature required by Section 481(c) of Title 29 U. S. C., that the damage, if any, accruing to the defendants by reason of this judgment is much less than that accruing to the plaintiffs, and in any event was brought about by the defendants' own conduct in violation of the temporary restraining order issued by this court, that the post-election remedies are not adequate for the enforcement of plaintiffs' Section 481(c) rights because they would result in delay and would require additional elements of proof not required in an action brought pursuant to the provisions of Section 481 (c), and due deliberation having been had thereon, it is

ORDERED, ADJUDGED AND DECREED that the complaint be and the same hereby is dismissed as against the defendant "Election Committee of Local 281, for the June 1968 elections, consisting of Julius Amadio, Chairman *et al.*," without costs as to either party, and it is further

APPENDIX E.

ORDERED, ADJUDGED AND DECREED that the purported election held on June 6, 1968, and the results thereof be and the same hereby are declared null and void, and it is further

ORDERED, ADJUDGED AND DECREED that said purported election and the results thereof be and hereby are vacated, and it is further

ORDERED, ADJUDGED AND DECREED that defendants conduct the election scheduled for June 6, 1968 on June 27, 1968, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants be, and they hereby are directed to distribute the campaign literature of the Opposition Slate to all members in good standing of the defendant Local; provided that the Opposition Slate delivers a sufficient quantity of envelopes with postage affixed on or before 5:00 P. M. June 21, 1968. The defendants shall address said envelopes with the equipment available at the Local office and shall deliver the same to representatives of the Opposition Slate at the office of the defendant Local at 5:00 P. M. on Monday June 24, 1968. The representatives of the Opposition Slate upon the delivery of the addressed envelopes shall forthwith insert their campaign material and seal said envelopes, after which they shall be deposited in the mail, without delay, by representatives of the Opposition Slate and the defendants. The expense of distribution is to be borne by the Opposition Slate to the same extent that the expense of distribution was borne by the Incumbent Slate in connection with the distribution of their campaign literature, one piece of which is plaintiffs' Exhibit I, and it is further

APPENDIX E.

ORDERED, ADJUDGED AND DECREED that the defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with them be, and they hereby are restrained from requiring the submission of campaign literature for review and approval prior to its distribution, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants pay the costs and disbursements of these proceedings to be taxed by the Clerk of this court, and that execution issue for the same.

EDMUND PORT,
United States District Judge.

Dated: June 15, 1968, Auburn, New York.

APPENDIX F.

Order Dated July 23, 1969.

Upon all of the proceedings had heretofore and pursuant to Rule 42, F. R. Crim. P., it is

ORDERED that Angelos Peter Romas, Attorney of Endicott, New York, be and he hereby is appointed as Attorney to prosecute the alleged criminal contempt in the above-entitled proceeding. This Order and Appointment to take effect *nunc pro tunc* as of July 22, 1968.

EDMUND PORT,
United States District Judge.

Dated: July 23, 1969, Auburn, New York.

APPENDIX G.

Cr. Form No. 101

United States District Court

FOR THE

NORTHERN DISTRICT OF NEW YORK

ANDREW BACKO, et al.
vs.
ERVING B. LAMBERT

CIVIL NO. 68-CV-186

On this 25th day of February, 1970, came the attorney for the plaintiff, as special prosecutor appointed by order of Hon. Edmund Port, U. S. District Judge, N. D. of N. Y. and the defendant appeared in person and by counsel, Thomas P. McMahon. The Court advised the defendant of his right to speak in his own behalf, defendant declines, his attorney speaks.

IT IS ADJUDGED that the defendant has been convicted by a jury verdict

of the offense of Criminal Contempt

as charged in an order to show cause

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) months. The Execution of the Jail Sentence is Suspended and the defendant is placed on probation for a period of four (4) months. As a special condition of probation, the defendant is directed to write a letter of apology to the Honorable Edmund Port, United States District Judge, Northern District of New York, Federal Building, Auburn, New York 13022 within ten (10) days.

APPENDIX G.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

Lloyd F. MacMahon

United States District Judge.
Sitting by Designation

Clerk.

[1] Insert "by counsel" or "without counsel: the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine or fine and costs, or until he is otherwise discharged provided by law, (4) the facts regarding the suspension of the sentence or sentences and (5) the period of probation.
If sentence is suspended and probation ordered, enter here the following: "The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of years from this date."

FPI ATLANTA—10-8-63—60M—4418

RUBY COLTON JUDGMENT

Petitioner Colton received a suspended sentence of two months, his probation conditioned upon writing a letter of apology to the Honorable Edmund Port, United States District Judge, Northern District of New York, Federal Building, Auburn, New York within ten (10) days.

APPENDIX H.

JUDGMENT ON JURY VERDICT — CIV 31 (7-68)

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED
JAN 29 1970
W. A. DWYER, Clerk

United States District Court

FOR THE

Northern District of New York

CIVIL ACTION FILE NO. 0'68CV-186 M

ANDREW BACKO, MIKE KARAMAN, CASIMIR MACKO, JAMES BARNO and ERCELL CUMMINGS,

Plaintiffs

vs.

JUDGMENT

LOCAL 281, United Brotherhood of Carpenters and Joiners of America, RUDY COLTON, Ind. and as President of Local 281, DUANE KANE, Ind. and as Vice President of Local 281, SEBASTIAN PATERNINTI, Ind. and as Treasurer of Local 281, ELECTION COMMITTEE OF LOCAL 281, for the June, 1968 Elections, consisting of JULIUS AMADIO, Chairman, et al, and ERVIN B. LAMBERT, Business Agent and Financial Secretary - Defendants

This action came on for trial before the Court and a jury, Honorable Lloyd F. MacMahon, sitting by designation, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that Judgment be entered against the defendants, Local 281, United Brotherhood of Carpenters and Joiners of America, Rudy Colton, Ind. and as President of Local 281, Duane Kane, Ind. and as Vice President of Local 281, [redacted], and Ervin B. Lambert, Business Agent, and Financial Secretary in the amount of Forty Seven Hundred Dollars ($4700.00).

Dated at Utica, New York, this 31st day of December, 19 69.

W. A. Dwyer

Clerk of Court

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 23 1971
E. ROBERT SEAVER, CLERK

In The

Supreme Court of the United States

October Term, 1971

No. 71-1863

LOCAL 281, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
ERVIN F. LAMBERT, RUDY COLTON and DUANE KANE,
Petitioners,

—*vs.*—

ANDREW BACKO, MIKE KARAMAN, CASIMIR MACKO,
JAMES BARNO and ERCELL CUMMINGS,
Respondents.

Respondents' Brief in Opposition to Petition for a Writ of Certiorari to The United States Court of Appeals for The Second Circuit

ANGELOS PETER ROMAS,
101 Washington Ave.,
Endicott, New York 13760,
(607) 754-4545,
Counsel for Respondents and U.S.A.

THEODOSIS J. TOTOLIS,
Of Counsel

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QUESTIONS PRESENTED

The real issues were:

1. After a Federal Judge in his chambers (Auburn, New York) files a summons and complaint and simultaneously notifies the Court Clerk (Utica, N. Y.) who assigns a Civil Action Number:

(a) May the same Federal Judge in chambers sign a Temporary Restraining Order under Federal Rules of Civil Procedure 65 and provide that it be served only with a copy of the complaint while the summons is being mailed to the Court Clerk for the Clerk's signature and issuance per Federal Rules of Civil Procedure for? Is this Temporary Restraining Order with attached complaint valid if it provides for and is served after the complaint is filed but prior to the summons being signed by the Court Clerk and issued for service?

(b) In order to sustain a jury verdict in a Civil and Criminal Contempt Proceeding based on a finding that a complaint was filed prior to the issuance of the violated Temporary Restraining Order, may the Court take Judicial Notice of what is in the Court Clerk's Index and the handwriting of the Judge as to the filing thereof upon the complaint attached to the Order to Show Cause dated June 6, 1968 which was submitted in evidence at the trial?

2. In the Civil and Criminal Contempt Proceedings for violation of the said Tem-

porary Restraining Order:

(a) May the attorney for the plaintiff and the U.S.A. testify when facts are peculiarly within his knowledge?

(b) Even though not authenticated by the Court Clerk per Federal Rules of Civil Procedure 44 and Federal Rules of Criminal Procedure 27, was it proper to admit as evidence a copy of the Temporary Restraining Order, which carried the actual signature of the Federal Judge when the attorney in whose presence it was signed testified as to its authenticity?

(c) When a person has knowledge of a Temporary Restraining Order must he be served with either the Order or the Complaint, or both, in order to be held responsible for its violation? If so, will the Union also be held to have had knowledge and be held responsible for its violation on the theory that its agents' knowledge is imputed to the Union?

(d) If it is necessary to prove service of the complaint with the Temporary Restraining Order where the Temporary Restraining Order provides for service of a copy of the prior filed complaint, may the jury verdict be upheld on the point of service of the complaint with the Temporary Restraining Order upon:

(i) Testimony of plaintiffs witnesses

that the "Restraining Order" and "Papers", and "This Order and what was in this Order" were served. D. A. 60, 61, 76, 77.

(ii) Testimony of defendants witnesses that "Papers" were served. D. A. 88.

(iii) Judicial notice of the Affidavits of Service filed with the Court Clerk 12 days after service of the Temporary Restraining Order with a complaint was actually served.

3. Doesn't a Federal Court always have the power to issue a Temporary Restraining Order in order to give it time to decide its own power and propriety of issuing an injunction?

4. In a Civil Contempt seeking compensatory damages, are not the legal expenses incurred in the Civil Contempt recoverable as damages?

(a) Where the evidence conclusively shows that the jury only granted legal fees claimed in the Civil Contempt and deleted the legal fees innumerated for the Criminal Contempt by plaintiffs Exhibit No. 6 produced in the Civil Contempt proceeding, was not the Court's erroneous instruction (including the fees for the Criminal Contempt) harmless error?

5. Since lack of a filed complaint was not raised in the evidentiory hearing on July

12, 1968, weren't the defendants foreclosed from contesting the issue in the subsequent Civil and Criminal Contempt Proceedings?

6. Even though the Criminal Contempt proceeding is not instituted in strict compliance with Federal Rule of Criminal Procedure 42 (b), are not the constitutional requirements satisfied where the defendants: (a) know who they are and subject themselves to the Court jurisdiction by appearance personally in Court and by attorney; (b) are aware that a Criminal Contempt is charged; (c) have been informed of the facts. Wasn't non-compliance with Criminal Rule 42(b) waived by failure to make any motion until after the jury was picked and opening statements completed?

STATEMENT OF CASE

1. Pursuant to Section 401 (c) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 481), Andrew Backo et al made a reasonable request of Local 281 at 8:30 A. M. on Monday, June 3, 1968, that Local 281 distribute by mail at the candidate's expense campaign literature in aid of the Plaintiff's candidacy in the election to be held between the hours of 1:00 P.M. and 8:00 P.M. on Thursday, June 6, 1968.

(a) Local 281 refused to distribute by mail the campaign literature which had been prepared at the expense of the Plaintiffs, Backo et al, and which had been presented according to the usual procedure to Local 281 together with envelopes to which Local 281 was to affix the mailing addresses of the members and then mail out (which addresses are not made available to the membership at large). Plaintiff Backo et al had offered to pay the expense of affixing the addresses and the mailing expense.

(b) On June 4, 1968, the Plaintiffs, Andrew Backo et al retained an attorney, (Angelos Peter Romas, Esq.) in order to obtain legal redress and enforcement of their rights. (Defendants-Appellants Appendix to U. S. Court of Appeals, 2d, Page 141 hereinafter referred to as D. A. 141).

2. On the morning of June 6, 1968, Mr. Romas, the attorney for Plaintiffs, Backo et al presented to Judge Edmund Port in his chambers at Auburn, New York, an ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

(hereinafter referred to as TEMPORARY RESTRAINING ORDER OR SHOW CAUSE ORDER) to which was attached a supporting affidavit, summons and complaint.

(a) As of 10:33 A. M. on June 6, 1968, Judge Port signed the submitted Temporary Restraining Order in the form of a Show Cause Order as shown on the said Order (D. A. 235).

(b) As of 10:33 A. M. on June 6, 1968, Judge Port filed the Show Cause Order, summons and complaint in Federal Court at Auburn, New York, and simultaneously telephoned (in the presence of A. P. Romas) W. A. Dwyer, Clerk of the U. S. District Court, Northern District of New York, whose office was in Utica, New York, and directed an entry of all the papers in the Court Clerk's Records in Utica, New York, so as to reflect the filing at Auburn, New York. (D. A. 235). See Criminal Contempt Exhibit #2; Judge Port letter dated June 6, 1968 to W. A. Dwyer, Clerk, U. S. District Court, Utica, New York.

3. The directive provisions of the Show Cause Order are set forth in D. A. 4-5.

4. The Show Cause Order and the Complaint ("the papers") were served upon Mr. Colton, the President and Assistant Business Agent of Local 281, in the presence of Mr. Lambert, the Business Agent of Local 281, just prior to 1:00 P. M. on June 6, 1968, outside

the Local 281 Union Hall just prior to the commencement of the election (D. A. 55-61).

(a) The papers were also served about 7:30 P. M. on June 6, 1968, upon Duane Kane, Vice-President of Local 281, Sebastian Paterniti, Treasurer of Local 281 and Julius Amadio of the Election Committee. (D. A. 58).

5. The Election results of the June 6, 1968 Election, which was held contrary to the Show Cause Order, were announced at the Local 281 Union Meeting held shortly after 8:00 P. M. on June 6, 1968 (D. A. 58-59).

(a) Defendants testified in the civil contempt portion of the September 25-26, 1969 proceedings as to their authority over the election proceeding and as to their participation in the election D. A. 172 and 179, despite contradictory statement on D. A. 165.

(b) Testimony exists as to the type of election held on June 6, 1968. D. A. 58 and 167.

6. On June 12 and 13, 1968, proceedings were held at the United States District Court in and for the Northern District of New York, Federal Building, Auburn, New York, before Hon. Edmund Port, United States District Judge. At the conclusion of said proceedings, a Judgment was rendered and filed on June 17, 1968, in the U. S.

District Court for the Northern District of New York in File No. 68-CV-186, declaring null and void the election held on June 6, 1968 and ordering a new election to be held on June 27, 1968.

7. By virtue of Local 281's holding the Election on June 6, 1968 in violation of the Show Cause Order, the Plaintiff's campaign material as originally prepared became obsolete and new campaign material had to be prepared at an additional expense to the Plaintiffs of $41.60 plus the additional time of approximately 150-200 man hours expended to prepare the same. In addition, Local 281, an unincorporated association, paid out $368.00 to the Election Committee for their services in holding the June 6, 1968 Election in violation of the Show Cause Order. Under New York Law, the members of an unincorporated association have an undivided interest in all the assets. (D. A. 124 and 129).

Wm. Bradley et al v. Joseph O'Hare et al. 11 A. D. 2d 15, 202 NYS 2d 141, 15 AIR 1451 (1960)

8. In order to recover these added expenditures caused by the violation of the June 6, 1968 Show Cause Order and to criminally punish those who had knowledge and violated the Temporary Restraining Order in the Show Cause Order of June 6, 1968, Plaintiffs Backo et al obtained the following series of "ORDER TO SHOW CAUSE AND FOR CON-

TEMPT JUDGMENT" pursuant to Rule 42 of the Rules of the United States District Court for the Northern District of New York:

(a) On July 22, 1968 Judge Port signed an "ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT" which was filed on July 23, 1968 and was made returnable on August 14, 1968 at Auburn, New York. Pursuant to Rule 5-(b) of the Federal Rules of Civil Procedure and Rule 43 of the Rules of U. S. District Court for Northern District of New York, the conformed copy of this ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT was served by mail dated July 26, 1968 and personally on August 2, 1968 on Emory Resseguie, partner of John Hogan, of Pearis, Resseguie, Hogan & Kline, Press Building, Binghamton, New York, the Attorneys for the Defendants named in the original proceeding and who represented them at the proceedings held on June 12 and 13, 1968 in Auburn, New York. Since E. B. Lambert was not a named defendant in the June 1968 summons and complaint the above attorneys would not accept service, personal service could not be obtained upon Ervin B. Lambert because he was evading service, and thus the matter was adjourned, until a new Show Cause Order could be obtained and served upon Ervin B. Lambert.

(b) On August 28, 1968, Judge Edmund Port signed an "AMENDED ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT" returnable on September 23, 1968 in Utica, New York, and pro-

viding for service upon Ervin B. Lambert on or before September 17, 1968; this was filed in the office of the Clerk, Northern District of New York on September 3, 1968. Personal service upon Ervin B. Lambert could not be accomplished. The matter was adjourned.

(c) By letter dated September 19, 1968 addressed to W. A. Dwyer, Clerk of the United States District Court for the Northern District of New York, Thomas McMahon informed the Court that he had been retained as Counsel in the referenced matter. (See letter dated August 8, 1969 to Judge Port - Record on Appeal p. 539).

(d) On October 1, 1968 Judge Edmund Port signed "SECOND AMENDED ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT" which was returnable on October 28, 1968 at Utica, New York. On October 22, 1968, Gerald P. O'Connor, Deputy Marshall, made a return certifying that he could not serve the same upon Ervin B. Lambert.

(e) October 28, 1968, at Utica, New York, Thomas McMahon appeared and submitted Ervin B. Lambert to the jurisdiction of the Court. On Page 1 of the Transcript of October 28, 1968 proceedings (D. A. 39), Mr. McMahon points out that Mr. Lambert was physically present in that Court Room. The parties were requested to submit Briefs, prior to setting the matter for a hearing.

On Page 2 of the Transcript of October 28, 1968 (D. A. 40) Thomas McMahon appears for the other "defendants".

(f) By letter dated November 25, 1968, A. P. Romas, Esq., submits his Brief. By letter dated December 13, 1968, Mr. McMahon declared that he would not submit a Brief but requested a hearing date for a trial at which he would make several additional motions. By letter dated December 24, 1968, A. P. Romas requested that Mr. McMahon make any additional motions in writing in advance of a hearing date. No Motions were ever made.

(g) By letter dated July 23, 1969, Judge Edmund Port appointed Angelos Peter Romas, Esq., as special prosecutor for the criminal contempt.

(h) On Page 17 of the Transcript of Proceedings (D. A. 46) held on October 28, 1968, it was made clear by Mr. Romas that the SECOND AMENDED ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT covered "And other punishment" and that this was meant to cover a criminal contempt, simultaneously with the civil contempt damages. Thomas McMahon letter dated August 8, 1969 (Record on Appeal p. 539) to Judge Port confirms Defendants' understanding that criminal and civil contempt was involved.

9. On September 24, 1969, a trial was held before Hon. Lloyd F. McMahon, United States

District Judge, before a jury on the criminal contempt. On September 26, 1969, before the same Judge and jury; the said jury found Ervin B. Lambert and Rudy Colton guilty, and all the other defendants not guilty. On September 26, 1969, before the same Judge and jury a civil contempt proceeding was had; a judgment against all of the defendants for $4700.00 was rendered; However, the opinion of Judge McMahon dated December 29, 1969, vacated the verdict as to defendant, Sebastian Paterninti.

10. Defendants appealed to the U. S. Court of Appeals for the second Circuit which affirmed.

Note: "D. A." refers to Defendants' Appendix to Brief submitted to Court of Appeals.

REASONS FOR DENYING WRIT

There has been no error committed below; the procedure adopted below has been approved by prior decision; and there is no conflict in the Circuits Courts.

I

No law is set forth herein on the issues, since these issues involve well settled law shich has been set forth in (1) the Briefs of the Plaintiffs and the U.S.A. which were submitted in the lower Courts; and (2) the decisions of the lower Courts.

II

However, a brief comment will be made on the Petitioners' assertion that there is a direct conflict between Brotherhood of Locomotive Firemen and Enginemen et. al. vs. U. S., 411 F.2d 318 (5th Cir., 1969) and the decision below at 438F.2d 176.

A close reading will reveal that the cases are readily distinguishable and no conflict exists. The Petitioner evidently felt that there was little merit since even the citation was omitted.

In the instant case (Backo), all of the defendants appeared in Court personally and were identified, and were represented by counsel who submitted them to the juris-

diction of the Court.

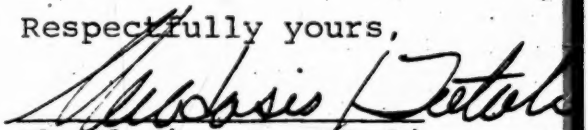
In the Brotherhood case, the alleged individual defendants who were referred to in the caption as "et. al." did not appear in Court individually or by attorney. Only the Labor Union attorney appeared and raised the question as to the identity of the individual defendants.

CONCLUSION

The decisions below were decided correctly on the facts and the law which is well settled.

Certiorari should be denied with costs and disbursements for Respondents herein.

Respectfully yours,



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DATED: September 7, 1971